In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 444

MICHELE MARCHESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1958 petitioner was convicted in the United States District Court for the Southern District of California of conspiracy and substantive counts charging violations of the narcotics laws. He was sentenced to imprisonment for ten years. The conviction was affirmed on appeal. 264 F. 2d 892, certiorari denied, 360 U.S. 930.

The facts underlying petitioner's conviction are set forth in the government's brief in opposition in No.

922, O.T., 1958. In that proceeding petitioner challenged *inter alia* the admissibility of testimony by enforcement officers who, in corroboration of testimony given by a government informer, related conversations between the informer and petitioner which they overheard through the use of a radio transmitter carried by the informer.

In this proceeding under 28 U.S.C. 2255, petitioner argues that the carrying of the radio device by the informer violated petitioner's constitutional rights under *Katz* v. *United States*, 389 U.S. 347, and that the *Katz* decision should be applied retroactively even though the judgment had become final. This Court has already held to the contrary in *Kaufer* v. *United States*, 394 U.S. 458, which also involved the use of a radio transmitter carried with the consent of one party to the conversation.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1969.

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[1] Petitioner also seeks to reargue the issue as to the right of Judge Clarke, on September 30, 1963 to reduce his sentence to the time served. This issue was decided against him by the Ninth Circuit. 341 F. 2d 782, certiorari denied, 382 U.S. 817; 378 F. 2d 16, certiorari denied, 389 U.S. 930.

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